

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

75-4122

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

MARCO NIKPRELEVIC,

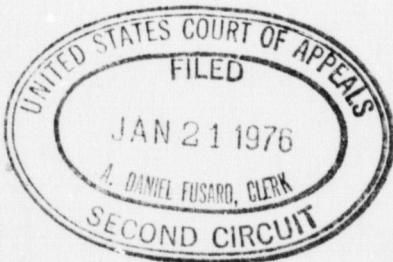
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF OF PETITIONER MARCO NIKPRELEVIC



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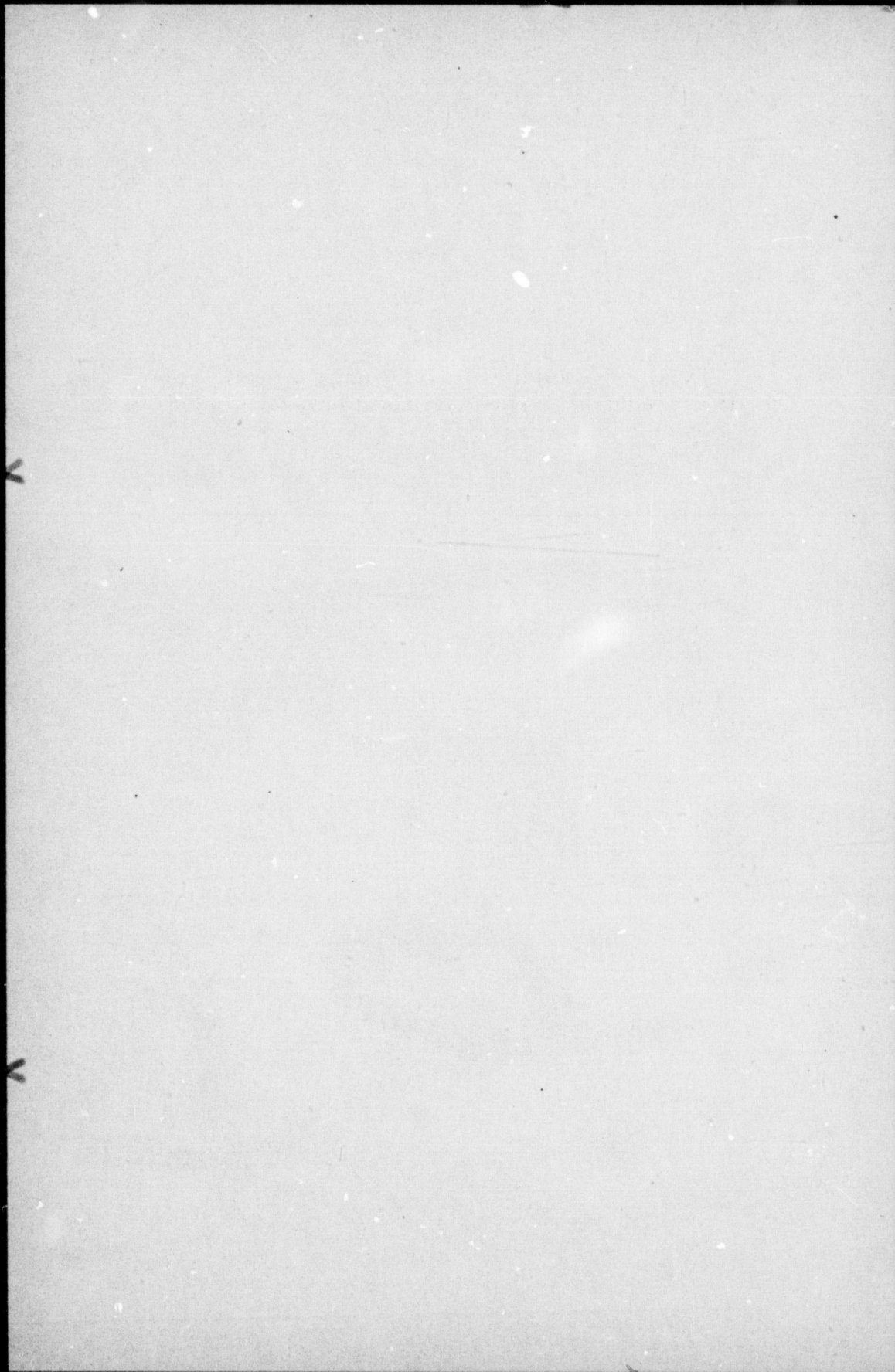


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Statement

This is a petition to review the decision of Board of Immigration Appeals dated May 28, 1975 (4 A), affirming the denial of withholding deportation pursuant to Section 243 (H) of the Immigration and Nationality Act by oral decision of the Immigration Judge dated November 14, 1974 (6 A).

Jurisdiction of This Court

Section 106 (A) (4) Immigration and Nationality Act (U.S.C. 1105 A):

“Except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General’s findings of fact, if supported by reasonable, substantial and probative evidence of the record considered as a whole, shall be conclusive.”

The Law

Section 243 (H) Immigration and Nationality Act (8 U.S.C. 1253):

"The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason."

Issues Involved

- I. Since the enactment of Section 243 (H) reflected the humanitarian concern of Congress to withhold deportation of an alien if he would be subject to persecution in his home country, then can this Court now turn the petitioner over to Yugoslavia for persecution and imprisonment for a crime he committed and paid for in the State of New York despite our constitutional guarantee of not being placed twice in jeopardy?
- II. Was the Immigration Judge's ruling, permitting government trial attorney to question petitioner (over objection) concerning his brother's and sister's education and positions in Yugoslavia, so prejudicial to petitioner as to deny him due process of law?
- III. Did the Immigration Judge's failure to rule on the request of petitioner's counsel, to take judicial notice of a refugee program paid for by the United States for the benefit of ten thousand Yugoslav citizens of Albanian descent, deny procedural due process to the petitioner's application for suspension of deportation?

Summary of Argument

The petitioner argues that his deportation to Yugoslavia would result in his re-imprisonment of many years for a crime he has paid his debt to society once, and in effect would be "persecution", and being placed twice in jeopardy contrary to our traditional concepts of fair play and justice for which the American system of justice is well known.

POINT I

The petitioner's deportation to Yugoslavia is tantamount to a criminal sentence of many years confinement for a crime which he pleaded guilty to, was imprisoned, released on parole and finally discharged completely after successfully completing his parole time.

Upon petitioner's release from prison, he was arrested and served with an order to show cause (34 A) why he should not be deported as an overstay visitor.

POINT II

Request for political asylum.

In the letter to the Department of State dated January 31, 1974 (33 A) the last paragraph thereof, reference is made to petitioner's fears that he would be imprisoned upon his return to Yugoslavia for the murder of a Yugoslav citizen.

The reply letter dated June 24, 1974 to Mr. Marks (30 A) denying petitioner's request for asylum also refers to Mr. Nikprelevic's claim that he will be imprisoned upon his return to Yugoslavia for the crime he paid for here in the State of New York.

POINT III

Is denial of request for political asylum tantamount to deportation?

This letter (30a) is in effect the trip lever to the Attorney General's delegate for further deportation action. If Mr. Wiesner made a mistake in judgment or if he was not aware of the "double jeopardy" clause in our Federal Constitution he in effect sentenced the petitioner to a term of imprisonment with his denial letter as the Attorney General is guided by the Department of State's decision.

POINT IV

Did this letter deny procedural due process of law to the petitioner?

The letter speaks for itself (30a).

Mr. Wiesner comments out of hand that there is no evidence that Mr. Nikprelevic would be imprisoned on the same charge upon returning to Yugoslavia. Mr. Wiesner may not know what evidence consists of. All the information regarding petitioner's imprisonment for sixteen months in Yugoslavia for his political beliefs and all other references to petitioner's uncle being imprisoned is evidence that came from the mouth of the petitioner. Now, the same petitioner states that he will be imprisoned for the same crime if deported and Mr. Wiesner says: "There is no evidence that he would be imprisoned on the same charge upon returning to Yugoslavia."

An applicant for withholding of deportation under Section 243 (H) is not without rights. The applicant is entitled to procedural due process. *United States ex rel. Leong Choy Moon v. Shaughnessy*, 218 F. 2nd 316.

He has a right to have his application considered. *Blazina v. Bouchard*, 286 F. 2nd 507.

An application may not be denied arbitrarily or capriciously or for reasons that evince a complete disregard of the law and the facts. *Dabrowski v. Holland*, 259 F. 2nd 44.

This letter of denial from the Department of State in effect denied procedural due process to petitioner as it did not consider petitioner's claim to re-imprisonment as evidence nor did the Dept. of State give an opportunity to the alien to present any evidence that he would be imprisoned upon his return to Yugoslavia. The denial of petitioner's request for political asylum once denied is the beginning of the deportation process long before the Immigration Judge hears the case, this we argue to be a denial of due process.

POINT V

Does prosecution and imprisonment for the same crime constitute persecution under Section 243 (H)?

There are no precedent cases that deal with this precise issue!

This point is one of first impression and no prior court has made a determination of this issue.

Cases which hold that imprisonment for conviction of crime does not constitute "physical persecution" within the interpretation of Section 243 (H) are

Kalatjis v. Rosenberg, 305 F. 2nd 249.

And in

Sovich v. Esperdy, 319 F. 2nd 21 on page 28.

Judge Waterman states as follows: "Punishment—after conviction for a crime cognizable under the recognized judicial system—is not persecution."

These cases as cited above can be distinguished on the facts of this case as this petitioner was not wanted for a

crime before he left Yugoslavia. He became subject to imprisonment in Yugoslavia when he committed the crime of killing a Yugoslav citizen here in New York, and for that crime he paid his debt to society.

POINT VI

Does the Fifth Amendment to the Federal Constitution which contains the "double jeopardy" clause protect the petitioner from deportation on legal grounds alone without further consideration of humanitarian grounds?

We think it does, because contained in the:

Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the military, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation. \

It can be argued that the petitioner is a person who will be held to answer for a capital offense, if deported to Yugoslavia, will be a person subject for the same offense to be put twice in jeopardy of life or limb and therefore eligible for constitutionally guaranteed protection under our Federal Constitution.

POINT VII

Is petitioner entitled to have a determination based upon the probability of persecution of himself, and not others?

We think yes. This is the holding in *Cheng Kai Fu v. Immigration & Naturalization Service*, 386 F.2d 753 (2d Circuit).

Yet, despite this holding, the Immigration Judge permitted trial attorney to cross-examine petitioner over objection (20A) regarding the occupations and education of his brother and sister. This is error and is so prejudicial to petitioner that it denied him due process of law.

POINT VIII

Immigration Judge never ruled on petitioner's counsel's motion to take judicial notice of refugee program paid for by United States Government enabling ten thousand Yugoslav citizens of Albanian descent, who are in the same social class of petitioner to come to the United States as refugees from Communist Yugoslavia.

The Immigration Judge erred when he failed to rule on this motion. It is common knowledge that the United States Government through various refugee organizations promoted, paid and participated in bringing thousands of Albanian ethnics from Yugoslavia via Italy where these persons were fed, housed and clothed, at our government expense.

This program has continued to as recently as two years ago due to the recognition by our State Department that Albanian ethnics although citizens of Yugoslavia were discriminated against and did not receive the educational and

economic advantages open to other citizens of Yugoslavia who were not Albanian ethnics.

See, *New York Times*, January 16, 1975, p. 8, col. 1, Malcolm W. Browne reporting.

CONCLUSION

Petitioner's application for withholding of deportation should be granted on constitutional grounds as well as humanitarian grounds, or the matter should be referred back to the Attorney General for furnishing of additional proof as to petitioner's claim of imprisonment if deported to Communist Yugoslavia.

Dated: January 16, 1976, New York, New York.

Respectfully submitted,

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